

Court of Appeals Division III
State of Washington

Opinion Information Sheet

Docket Number: 23504-1-III
Title of Case: Herbert Nelson, obo v. Appleway Chevrolet, Inc., et al
File Date: 10/13/2005

SOURCE OF APPEAL

Appeal from Superior Court of Spokane County
Docket No: 04-2-01725-9
Judgment or order under review
Date filed: 10/13/2004
Judge signing: Hon. Kathleen M O'Connor

JUDGES

Authored by Frank L. Kurtz
Concurring: John A. Schultheis
Kenneth H. Kato

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HERBERT NELSON, on his behalf) No. 23504-1-III
and on behalf of all others)
similarly situated,)
Respondent,) Division Three
) Panel Seven
) v.)
) APPLEWAY CHEVROLET, INC., a)
Washington corporation, d/b/a)
APPLEWAY)
SUBARU/VOLKSWAGEN/AUDI,) PUBLISHED OPINION
APPLEWAY ADVERTISING, APPLEWAY)
AUDI, APPLEWAY AUTOMOTIVE)
GROUP, APPLEWAY CHEVROLET)
LEASING, APPLEWAY GROUP,)
APPLEWAY MAZDA, APPLEWAY)
MITSUBISHI, APPLEWAY SUBARU,)
APPLEWAY TOWING, APPLEWAY)
TOYOTA, APPLEWAY VOLKSWAGEN,)
EAST TRENT AUTO SALES, LEXUS OF)
SPOKANE, OPPORTUNITY CENTER,)
and TSP DISTRIBUTORS; and)
AUTONATION, INC., a Delaware)
corporation,)
Petitioner.)

KURTZ, J. - Business and Occupation (B&O) taxes are not intended to be construed as taxes upon purchasers or customers, but, instead, 'shall be levied upon, and collectible from, the person engaging in the business activities . . . and shall constitute part of the operating overhead.' RCW 82.04.500. Herbert Nelson purchased a vehicle from Appleyway Volkswagen. After the purchase price was negotiated, the parties signed a sales agreement listing an additional amount designated as 'Business & Occupation Tax Overhead.'¹ Mr. Nelson filed an action seeking a declaratory judgment that Appleyway's collection of the B&O tax, and the sales tax on the B&O tax, was unlawful. Mr. Nelson also requested class certification under CR 23(b)(2) and other relief. The court certified the class and granted summary judgment, concluding that Appleyway's method of itemizing and collecting the B&O tax and B&O sales tax was unlawful.

In this appeal, Appleyway challenges Mr. Nelson's right to bring this claim under Washington's uniform declaratory judgments act (UDJA). Appleyway further contends RCW 82.04.500 authorizes the pass through of the B&O tax to customers. Appleyway finally contends the court erred by certifying the class because Mr. Nelson lacked standing and has no cognizable claim. We conclude Mr. Nelson had a right to bring this claim under the UDJA. We hold Appleyway's manner of assessing and collecting the B&O tax from customers violated RCW 82.04.500. We further hold Mr. Nelson has standing and his request for monetary relief did not bar certification under CR 23(b)(2). Accordingly, we affirm the judgment of the trial court.

FACTS

In September 2002, Herbert Nelson purchased a used Volkswagen Cabriolet from Appleyway Volkswagen in Spokane, Washington. Appleyway Volkswagen is a car dealership within the Appleyway Chevrolet, Inc., group of dealerships. The parties agreed on the price of \$16,822 for the vehicle and entered into an Agreement to Purchase (the 'Agreement'). In addition to the sales price, the Agreement listed several fees and taxes, including Washington State sales tax of \$1,255.60 and a charge of \$79.23 for Washington State B&O tax. The amount of sales tax included sales tax charged on the B&O tax.

Washington B&O Tax. Washington imposes a B&O tax for the privilege of engaging in business. RCW 82.04.220. This tax is measured by the

